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IN THE

Supreme Court of the United States

October Term, 1951

No.

THEODORE D. LEWIS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

To the Honorable, The Chief Justice and The Associate Justices of the Supreme Court of the United States:

The petitioner, appellant below, prays that a writ of *certiorari* issue to review the judgment entered by the United States Court of Appeals for the District of Columbia Circuit, in the above-entitled cause, Appeals No. 10,742, on May 10, 1951, (R. 16).

OPINIONS BELOW.

The United States District Court for the District of Columbia did not render an opinion in this cause. The appeals opinion therein is set forth on pages 13-15 of the Record.

JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia Circuit here in question was entered on May 10, 1951, (R. 16) and a petition for rehearing was denied July 12, 1951 (R. 17). The jurisdiction of this Court is invoked under Title 28 U.S.C., Sec. 1254-(1); June 25, 1948, C. 646, 62 Stat. 928.

QUESTION PRESENTED.

Whether a claim by a beneficiary of the Policemen and Firemen's Relief Fund, District of Columbia, (hereinafter referred to as the Fund) is a "claim or remedy" against said District or against the United States.

STATUTES INVOLVED.

The pertinent parts of the statutes involved are hereinafter discussed in the argument, and are also set out in the Appendix hereto.

STATEMENT OF FACTS.

The petitioner, at the time of his subject injury, was a member of the United States Park Police force. The respondent is the United States. On or about September 18, 1946, another employee of the respondent, also a Park policeman, negligently and recklessly shot the petitioner five times, grievously wounding him. Members of the United States Park Police are by statute entitled to all the benefits of the Fund; and have been held, as of May 18, 1951, not entitled to any benefit provided by the Federal Employees' Compensation Act. (App. 11).

Petitioner, having received his rightful benefits from the Fund, sought damages under the Federal Tort Claims Act; but his complaint was dismissed by the United States District Court for the District of Columbia (R. 4); the Order of dismissal being affirmed by the Court of Appeals *on*

grounds not considered by the District Court. The petitioner prays hereby for a review of the Appeals decision on *certiorari.*

SPECIFICATIONS OF ERRORS TO BE URGED.

The Court of Appeals erred (1) in its ruling that the Policemen and Firemen's Relief Fund, District of Columbia (Act of September 1, 1916, 39 Stat. 718, C. 433, 12; Act of May 27, 1924, 43 Stat. 176, C. 199, 7; D. C. Code (1940 Ed. 4-501 et seq.; 4-515) is a *federal* system of "simple, certain, and uniform *compensation* for injuries and death;" (2) in holding that the decision in *Wham* v. *United States,* 180 F. 2d. 38, C.A.D.C. (1950) is not controlling in the instant case; and (3) in holding that the instant case is in any controlling aspect analogous to the case of *Feres* v. *United States,* 340 U.S. 135.

REASONS FOR GRANTING THE WRIT.

The petitioner asserts that a writ of *certiorari* should be granted in this cause, under subdivision five (5) of Rule 38 of this Court, because the Appeals decision hereby sought to be reviewed directly conflicts with one of its own earlier decisions on the same matter (*Wham* v. *United States, supra*) in that it here holds the Fund to be a *federal* system of "simple, certain, and uniform compensation for injuries or death," while in the *Wham* case it expressly held, *au contraire,* upon consideration of the identical statutes here involved, that "neither in form nor substance, name nor character can it (the Fund) be regarded as a fund of the United States."

The petitioner further respectfully bespeaks a timely and final determination of the federal question of local importance, as to whether the Fund as authorized by Congress is a federal system of "simple, certain, and uniform compensation for injuries or death," or merely a local retirement-insurance system, distinct from and in no substantive

sense related to any "system of compensation," federal or otherwise.

It is finally and respectfully submitted that the Court of Appeals has erred in its failure to accord the proper effect to the decision of this Court in *Feres* v. *United States*, 340 U.S. 135, in that said case would have the controlling effect attributed to it *only on an express finding that the Fund is a federal system of compensation*, which finding would be both contrary to the facts and inconsistent with the ruling in the unreversed *Wham* case.

The writ should be granted on all the aforegoing grounds, for the reasons herein stated.

ARGUMENT.

A. The Appeals Decision Hereby Sought to be Reviewed Is In Direct Conflict with the Antecedent Decision of the Same Court in Wham v. United States, supra.

1. The facts in both cases are substantively identical.

Wham was a member of the Metropolitan police of the District of Columbia; the petitioner herein was a member of the United States Park Police. Each was injured through the negligence of a Federal employee. Each had received benefits under the Fund. Neither was entitled to benefits under the Federal Employees' Compensation Act. [The Bureau of Employees' Compensation of the Department of Labor has expressly held that the petitioner herein is NOT entitled to any benefits under the Federal Employees' Compensation Act. (App. 11)]. Wham was allowed to sue; the petitioner was denied the right.

2. The controlling statutes in both cases are identical.

The only statutes involved in this case, as well as in the *Wham* case, are the Federal Tort Claims Act (App. 9) and an Act of Congress authorizing the establishment and operation of the Fund, (App. 9-10).

3. The respective decisions of the court below are irreconcilably inconsistent.

The District Court in the *Wham* case, having concluded that the United States had provided through the Fund a comprehensive system of compensation for the members of the class to which Wham belonged, denied to him, as a member of that class, the right to maintain an action for damages under the Tort Claims Act; citing *Dobson* v. *United States*, 2 Cir., 27 F. 2d. 807, *certiorari* denied 278 U.S. 653; *Bradey* v. *United States*, 2 Cir., 151 F. 2d. 742; and *Dahn* v. *Davis*, 258 U.S. 421.

The Court of Appeals flatly rejected the latter reasoning, and reversed the decision in the *Wham* case, on the stated ground that:

> We think it is not accurate to speak of the Federal Government as supporting the Police and Firemen's Fund, * * *. *Neither in form nor substance, name nor character, can it be regarded as a fund of the United States.* Of course, Congress, in its capacity as the lawmaking body for the District of Columbia, authorized the plan whereby the Fund has been established and conducted under local auspices. However, *that does not justify the argument that the United States created the fund.* It has been *created* and *supported* by the *monies* flowing into it from the *many sources* authorized by the Statute, *including the small proportions indirectly reaching it from federal revenues.* (Petitioner's italics.)

The Court of Appeals further characterized the Fund as non-Federal, by its denial of the contention that Wham had been required to elect his remedy, as between benefits under the Fund and a suit under the Tort Claims Act, on the stated grounds that:

> The doctrine of election applies only where inconsistent remedies are pursued to enforce the same cause. * * * But where there are two or more concurrent and consistent remedies, one or all may be prosecuted until

> full satisfaction is obtained. Here appellant's injuries gave rise to separate and distinct claims, *one* as a policeman *against the District of Columbia* for benefits afforded by the Fund, *another* as an individual *against the United States* for damages accorded by the Tort Claims Act. Obviously, *these are not inconsistent remedies to enforce a single right, but concurrent or cumulative remedies against different defendants* in pursuit of *separate and distinct causes of action.* (Petitioner's italics.)

Au contraire, in the instant case, the Court of Appeals has held that the Fund is a system of "simple, certain and uniform compensation," provided by Congress for beneficiaries of that Fund, and that to allow the petitioner herein to maintain his action under the Tort Claims Act would be to afford him either a *double recovery* or an *election* of remedies *against the United States.* That this was the *ratio decidendi* of the instant case is clearly apparent from the statement on pages 2 and 3 of the opinion below, that:

> Like the soldier in the *Feres* case, the Park policeman obtains the benefit of "systems of simple, certain, and uniform compensation for injuries or death." Members of the Park Police are by congressional enactment entitled to "all the benefits of relief and retirement" furnished by the "Policemen and Firemen's Relief Fund, District of Columbia." That "statutory scheme contemplates a broad system of relief by way of medical and hospital care and treatments, pensions, and retirement." As was said in the *Feres* case, "If Congress had contemplated that this Tort Act would be held to apply to cases of this kind, it is difficult to see why it should have omitted any provision to adjust *these two types of remedy* to each other." (Petitioner's italics.)

Thus, the Court of Appeals in the instant case has adopted the reasoning of the District Court which it flatly rejected in its consideration of the *Wham* case.

The Court of Appeals had sought to distinguish the instant case from the *Wham* case, on the ground that Wham was employed by the District of Columbia, while the petitioner herein was a Federal employee. But the decision in the *Wham* case was grounded, NOT upon the Federal or non-Federal status of the beneficiaries of the Fund, but upon the characterization and classification of the Fund as having been *created by the District of Columbia* and *supported without recourse to Federal funds,* thereby constituting a claim under the Fund a remedy against the District of Columbia, and not against the United States.

Thus, in both cases, while the Court below had consistently adhered to the broad general principle enunciated earlier by this Court in *Dahn* v. *Davis, supra,* and recently in *Feres* v. *United States, supra,* that those members of a class for whom Congress has provided a system of simple, certain, and uniform compensation for injuries or death may not sue the United States under the Tort Claims Act, it had held in applying that principle in the *Wham* case that the Fund, as availed of therein, is NOT a Federal Government system, and now by a direct contraversion in the instant case that the identical Fund, as identically availed of by the petitioner herein, IS a Federal Government system.

The aforegoing irreconcilable conflict of decisions, therefore, poses the question now requiring decision by this Court, as to whether a claim by a beneficiary of the Fund is a "claim or remedy" against the District of Columbia or against the United States. The question so presented is a Federal question of vast local and public importance, which has not been but should be correctly and finally settled by this Court.

CONCLUSION.

Wherefore, the petitioner prays that a writ of *certiorari* may issue in this cause, under the Seal of this Court, directed to the United States Court of Appeals for the District of Columbia Circuit; that, upon review, the judgment of said Court be vacated, reversed, and set aside; and that this cause be remanded to said Court with instructions to proceed further in accordance with the views to have been propounded by this Court.

Respectfully submitted,

OTIS BEALL KENT,
Attorney for Petitioner.

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APPENDIX.

Statutes Involved in Argument.

1. The Federal Tort Claims Act, being in part as follows:

(a) *Jurisdiction of District Courts*—Sec. 1346(b):

* * * the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after Jan. 1, 1945, for * * * personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his * * * employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C.A. Sec. 1346(b), June 25, 1948, C. 646, 62 Stat. 933; Amended April 25, 1949, C. 92, Par. 2(a), 63 Stat. 62; May 24, 1949, C. 139, par. 80(a)(b), 63 Stat. 101.

(b) *Liability of United States*—Sec. 2674: The United States shall be liable respecting the provisions of this Title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. 28 U.S.C.A. Sec. 2674, June 25, 1948, C. 646, 62 Stat. 983.

2. Title 4, Chapter 5, D. C. Code (1940):

§4-501 *Creation.*

The funds authorized by law prior to September 1, 1916, and known as the police relief fund and the firemen's relief fund shall be designated and known as the policemen and firemen's relief fund, District of Columbia. (Sept. 1, 1916, 39 Stat. 718, ch. 433, §12.)

§4-503 *Composition—Deficiencies supplied from revenues of District of Columbia—Pensions payable from Accounting.*

The said fund shall consist of all fines imposed by the commissioners of the District of Columbia upon members of the police and fire departments of said District by way of discipline; all rewards, proceeds of gifts, and

emoluments that may be received by any member of said departments (for extra-ordinary services), except such part thereof as the said commissioners may allow to be retained by members of said departments; a deduction of three and one-half per centum of the monthly salary of each member of said departments; donations; and the net proceeds of sales of unclaimed property in the custody of the property clerk of the police department; all of which shall be paid into the treasury of the United States to the credit of the "Policemen and firemen's relief fund, District of Columbia," herein provided for; and should the said fund at any time be insufficient to defray the expenditures hereinafter provided for, the commissioners of the District of Columbia, in that event, are authorized and it shall be their duty, to direct the collector of taxes of said District, and it shall be the duty of the said collector, pursuant to such direction, to pay into the treasury of the United States, out of the general revenue of the District of Columbia collected by him, to the credit of the said "Policemen and firemen's relief fund, District of Columbia," such sums as may be necessary from time to time to meet deficiencies in said fund. The moneys to the credit of the said fund shall be available for appropriation by Congress annually only for expenditure on requisitions of the said commissioners for the purposes set forth in sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514 inclusive, of this title, and all expenditures from said fund shall be made and accounted for in the same manner as other expenditures of the government of the District of Columbia are made and accounted for. (Sept. 1, 1916, 39 Stat. 718, ch. 433, §12; May 27, 1924, 43 Stat. 176, ch. 199, §7; June 7, 1924, 43 Stat. 560, ch. 302; July 1, 1930, 46 Stat. 840, ch. 783, §5.)

§4-515 *Retirement provisions made applicable to park police force—Rate of payment.*

Under and in accordance with sections 4-501, 4-503, 4-506 to 4-510, 4-512 to 4-514, members of the United States park police force shall be entitled to all the benefits of relief and retirement therein authorized.

COPY

U. S. DEPARTMENT OF LABOR
BUREAU OF EMPLOYEES COMPENSATION
WASHINGTON, D. C.

May 18, 1951

File No. X-586570

Mr. Theodore D. Lewis
1829 Bay Street, S. E.
Washington, D. C.

Dear Mr. Lewis:

Reference is made to the injury alleged to have been sustained by you on September 18, 1946, while employed as Detective by the National Park Service, Department of the Interior, Washington, D. C.

On the basis of the evidence on file in your case it does not appear that you are entitled to benefits under the Federal Employees' Compensation Act because you were not a Civil Officer or Employee of the United States at time of injury within the meaning of the Act.

This notice is not a decision on your case but is intended to give you an opportunity to present any further evidence you may care to offer before a decision is made.

No further action will be taken by the Bureau concerning your right to benefits unless, in response to this letter, you advise whether you intend to perfect your claim.

Very truly yours,

S. D. Logsdon,
Chief of Section.

Byron N. Scott,
Attorney at Law
1025 Vermont Ave., N. W.,
Washington, D. C.